OOI LEAN CHAI

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CRIMINAL APPEAL NO. 05-139 OF 1990]
10 MAY 1991

CRIMINAL PROCEDURE: *Retrial - Necessity to re-serve chemist report - Served in earlier trial - Condition precedent of statutory requirements - Rules of admissibility - Meaning of "retrial" - Prosecution has to prove case all over again - Criminal Procedure Code, s. 399(i).*

STATUTORY INTERPRETATION: *Meaning of "retrial" - Criminal Procedure Code, s. 399(i).*

The appellant O was found guilty of the offence of trafficking in 51.76 gms of heroin and 26.98 gms of a drug M under the Dangerous Drugs Act 1952 (the Act) and was sentenced to death. O's appeal to the Supreme Court was allowed and a retrial was ordered on the ground that one of the two substances forming the subject matter of the original charge was not "dangerous drugs" within the meaning of s. 2 of the Act, although it was so described in the chemist's report. (The decision of the High Court in the first trial is reported in [1990] 2 CLJ (Rep) 798).

At the retrial, whereby O was only charged in relation to the heroin, O was again found guilty and sentenced to death. In this appeal, O contends that the Judicial Commissioner erred in law in the interpretation of s. 399(i) of the Criminal Procedure Code (CPC) in holding that there was no requirement on the prosecution to re-serve the chemist report on not less than 10 clear days before the commencement of the retrial because the report had been served on him within the requisite time before the commencement of the first trial.

Held:

[1] Section 399(i) of the CPC was not merely a procedural provision but contained rules of admissibility of chemist reports which dispensed with the need to call the Government chemist as maker of the document as a witness. The proviso to s. 399(i) of the CPC is a condition precedent and if not complied with, the chemist report cannot be admitted in evidence without calling the government chemist to produce it.

[2] (a) The word "retrial" means a new or fresh trial - the retrial could not be treated as a continuation of the first vitiated trial and whatever was done by the prosecution during the earlier trial towards proving the essential ingredients of the charge, must be ignored as non-existent and of no effect as it is incumbent on the prosecution in a retrial, to prove its case all over again beyond any reasonable doubt by evidence in accordance with law;

(b) in this case, the charge at the retrial was also different from that of the first trial and both trials were heard by different corams.

[3] (a) For the purpose of s. 399(i), the chemist report must be served all over again on O and it was only when there was such a compliance that the report would be admissible notwithstanding the absence of the chemist and it was only then that O if he so elected, could insist on the chemist appearing in person by giving 3 clear days notice before commencement of the retrial;

(b) if the prosecution had for whatever reason intended not to call the government chemist to give evidence at the retrial notwithstanding the serious error discovered in the chemist report in the earlier appeal, then it must once again comply with the condition precedent imposed by s. 399(i) in order to render the chemist report admissible in evidence.

[4] The chemist report being inadmissable, there was no evidence before the Court that the subject matter of the charge was heroin within the meaning of s. 2 of the Dangerous Drugs Act 1952.

[Appeal allowed.]

Cases referred to:
A.G. v. Kelly (No. 2) [1938] IR 109
Chah Siew Kok v. PP [1987] CLJ (Rep) 518
Mohamed bin Abdul Rahman v. PP [1979] 1 MLJ 252
PP v. Lim Chen Len [1981] 2 MLJ 41

Legislation referred to:
Courts of Judicature Act 1964, ss. 60, 71
Criminal Procedure Code, ss. 399(i)(b),(ii), 422
Criminal Procedure Code (Cap. 21) (Straits Settlement), s. 427(1)
Dangerous Drugs Act 1952, ss. 2, 39B (1)(a), (2), 3

Other sources referred to:
Stroud's Judicial Dictionary (4th Edn.)
The Oxford Companion to Law by David M. Walker

For the appellant - Teh Pok Teik; M/s. Abdul Raman Saad & Associates
For the respondent - C.T. Wong, DPP

JUDGMENT

Mohd. Azmi SCJ:

At a retrial, the appellant was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, in that on 18 August 1983, on or about 7.30 p.m., he did traffic in dangerous drugs, namely heroin weighing 51.76 gms. at No. 34-B, Jalan Abiad, Taman Sri Tebrau, Johor Bahru, an offence punishable under s. 39B(2). He was found guilty and sentenced to death by the learned Judicial Commissioner on 12 July 1990.

The crucial point taken by the appellant in this appeal was the interpretation of s. 399(i) of the Criminal Procedure Code relating to the admissibility of a chemist report produced at his retrial as Exhibit P38 to prove that the subject matter of the charge was heroin. In the petition of appeal it was contended that the learned Judicial Commissioner erred in law in the interpretation of s. 399 in holding that there was no requirement on the prosecution to re-serve the chemist report on the appellant not less than ten clear days before the commencement of the retrial because the report had been so served on him within the requisite time before the commencement of the first trial. There was no dispute that on 13 March 1990, *vide* Supreme Court Criminal Appeal No. 05-43 of 1989, the Supreme Court had allowed

the appellant's appeal against conviction and death sentence and had ordered a retrial on the ground that one of the two substances forming the subject matter of the original charge was not "dangerous drugs" within the meaning of s. 2 of the Dangerous Drugs Act 1952, although it was so described in the chemist report.

The relevant part of s. 399(i) provides:

> Any document purporting to be a report under the hand of any of the persons mentioned in subs. (ii) of this section (which includes Government chemists) upon any person, matter or thing examined or analysed by him...may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person...shall be required to attend as a witness:
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> (a) by the Court; or
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> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
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> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he **shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.** (Emphasis supplied)

It was common ground that in the first trial (unlike the retrial), the accused was charged for trafficking not only in 51.76 gms. of heroin but also in 26.98 gms. of 6-monoacetylmorphine at the same place and time as stated in the present charge. In the chemist report, which was produced under s. 399(i) CPC at the earlier trial, the report had stated that both the heroin and 6-monoacetylmorphine were "dangerous drugs" as defined in s. 2 of the Dangerous Drugs Act 1952. The argument was put forward in the first appeal which was accepted by the Supreme Court that what was stated by the chemist in his report was incorrect because at the material time, 6-monoacetylmorphine was not listed as dangerous drugs in the first schedule of the Act - hence, the order of retrial.

In his grounds of judgment, the learned Judicial Commissioner had this to say:

> At the close of the prosecution case, the learned defence Counsel informed the Court that he has only one point to submit relating to the failure of the prosecution to prove its case against the accused. He relied solely on the admissibility of the chemist report. He based his stand on the fact that the chemist is not called to testify and that the report itself was not correct.
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> He informed the Court that it is due to the incorrect statement in the chemist report that lead to the present trial. This case is a retrial ordered by the Supreme Court after allowing an appeal of the accused in Criminal Trial No. 10-1984 (I shall refer this as the 1st trial). I was to learn later that the learned trial Judge found the accused guilty of an almost similar charge under s. 39(B)(1) of the Dangerous Drugs Act but of drugs besides heroin included 6-monoacetylmorphine which at the material time was not listed as a dangerous drug under the 1st schedule of the Dangerous Drugs Act 1952.
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> The inclusion of 6-monoacetylmorphine in the charge sheet of the 1st trial was most likely due to the statement made by the chemist on the last page of the chemist report which the chemist states as follows:
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> > Heroin and 6-monoacetylmorphine are 'dangerous drugs' as defined in s. 2 of the 'Dangerous Drugs Act 1952'. 6-monoacetylmorphine is an ester of morphine as in Part III of the First Schedule to the above Act.
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> In the present case, the 6-monoacetylmorphine is left out of the charge and the accused is only charged for trafficking in heroin, (6-monoacetylmorphine has since been listed as a dangerous drug under schedule 1 of the Dangerous Drugs Act).

> This same chemist report used in the 1st trial is now tendered as evidence and marked by this Court as P38. The learned Deputy Public Prosecutor felt that there is no necessity to call the chemist and based her stand on the contention that since chemist report was served well within the time limit stated in s. 399 Criminal Procedure Code and that the defence has not given notice to object to the said report to warrant calling the chemist, the report is admissible. There is no necessity of re-serving the same report to the accused in respect of this retrial.

The learned Counsel for the appellant submitted that under s. 399(i) CPC the chemist report must be re-served because the word "trial" included "retrial". On the other hand, the learned Deputy Public Prosecutor contended that since the chemist report had been served on the appellant about seven years ago at the first trial, there was no necessity to re-serve the same all over again. Since the appellant knew of the intention of the public prosecutor to produce the chemist report, it was for him to give notice under s. 399(i)(b) if he so required the attendance of the government chemist.

The learned Counsel for the appellant referred to us the case of *PP v. Lim Chen Len* [1981] 2 MLJ 41, where Mohd. Azmi J (as he then was) held at p. 42:

> In *Chong Yik v. PP*, Storr J held that in proviso to s. 399(i) of the Criminal Procedure Code is a condition precedent and, if not complied with, the report of the Government Chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongful admission is an illegality which cannot be cured under s. 422 of the Criminal Procedure Code. Similarly, in *Wong Kok Keong v. R.*, Spenser Wilkinson J in dealing with s. 427(1) of the Straits Settlement Criminal Procedure Code (Cap. 21) which was in *pari materia* with s. 399(i), held the view that the provisions related to evidence rather than to procedure. After perusing a number of authorities including *Ng Yee's* case, *Chong Yik's* case and *Chong Peng v. PP*, his Lordship said at p. 15:
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> > It is clear from all these authorities that where the requisite ten days' notice of the intention to use the certificate has not been given the certificate is inadmissible. The only point upon which the decisions differ is as to the effect of the wrongful admission of such a certificate, and in all the decided cases except one, the wrongful admission has resulted in the conviction being quashed on the ground that there was no other evidence on the crucial point.
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> > Thinking, as I do, that the provisions of s. 427 are in substance provisions relating to evidence I feel constrained to follow the decisions of Storr J and Bellamy J.
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> With respect, I agree that the provision of s. 399(i) of the Criminal Procedure Code relates to admissibility of evidence and is not merely procedural.

We agreed that s. 399(i) CPC was not merely a procedural provision but it contained *inter alia* rules of admissibility of chemist report which dispensed with the need to call the Government chemist as maker of the document as a witness. The learned Counsel for the appellant also referred to the case of *Chah Siew Kok v. PP* [1987] CLJ (Rep) 518 where Peh Swee Chin J held that if a chemist report was admitted in contravention of s. 399 of the Criminal Procedure Code, it would be an irregularity of a serious nature and the report in such circumstances was inadmissible evidence despite its admission. He also held that a waiver or an estoppel could not be raised against s. 399 which imposed a duty on the prosecution to call the chemist as a witness. Further a waiver by an accused person could not be held against him in regard to rules of procedure and evidence in criminal proceedings. Any admission of inadmissible evidence even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any Court to assess.

In our view it is settled law that the proviso to s. 399(i) CPC is a condition precedent and if not complied with, the chemist report cannot be admitted in evidence without calling the Government chemist to produce it.

The power of the Supreme Court to order a retrial in criminal appeals is contained in s. 60 of the Courts of Justice Act 1964. In civil appeals, the power to order a new trial is conferred by s. 71. The word "retrial" is defined by *The Oxford Companion to Law* by David M. Walker as:

> A fresh trial of a case. In civil cases tried by jury, if the verdict is set aside on appeal as unjustifiable, a retrial is ordered. In criminal cases a retrial may be ordered where the first trial has in truth been only an apparent trial, having been vitiated by a defect so fundamental as to render it a nullity, and also where the Court of Appeal allows an appeal against conviction only by reason of fresh evidence received or available and it appears to the Court that the interests of justice require it, it may order a retrial.

In *Stroud's Judicial Dictionary* (4th Edn.), the word "retrial" in the Courts of Justice Act 1928 (Ireland) (No. 15 of 1928) means a finished trial, a proceeding in which the guilt or innocence of the accused is determined. Accordingly, where a retrial had been ordered and the jury disagreed, it was held that there had not been a retrial. (*A.G. v. Kelly* (No. 2) [1938] IR 109).

We are of the view that the word "retrial" means a new or fresh trial. When the Supreme Court in the first appeal quashed the conviction of the appellant and set aside the death sentence and ordered a retrial, the Court was clearly ordering a fresh or new trial against the appellant, the first trial being a nullity. The retrial could not be treated as a continuation of the first vitiated trial, and whatever was done by the prosecution during the earlier trial towards proving the essential ingredients of the charge, such as service of notice under s. 399(i) CPC must equally be ignored as non-existent and of no effect. Indeed in this case even the charge at the retrial was different from that of the first trial, and both trials were heard by different corams. In the circumstances, for the purpose of s. 399(i) CPC, the chemist report must be served all over again on the appellant, and it was only when there was such a compliance that the report would be admissible notwithstanding the absence of the chemist, and it was only then that the appellant if he so elected, could insist on the chemist to appear in person by giving 3 clear days notice before the commencement of the retrial. We did not agree with the contention of the learned Deputy Public Prosecutor that during the retrial the prosecution could legally rely on the notice served about seven years ago, that is, served 10 clear days before the commencement of the first vitiated trial as sufficient compliance with the pre-condition imposed by s. 399(i).

The learned trial Judicial Commissioner had relied on the case of *Mohamed bin Abdul Rahman v. PP* [1979] 1 MLJ 252. We agreed with the argument of the learned Counsel for the appellant that the authority was not applicable here because the chemist report in that case had been properly served on the accused, which meant that the proviso to s. 399(i) had been complied with in that trial.

The condition precedent in s. 399(i) is that if the public prosecutor intends to give in evidence the chemist report, he shall deliver a copy thereof to the accused in not less than ten clear days before the commencement of the trial. In our view when the report was served on the appellant before the first trial by the public prosecutor, such intention of producing the chemist report could only relate to the first trial and could not be extended to the retrial. The public prosecutor when deciding the matter in the earlier prosecution about seven years ago could not possibly have foreseen the retrial ordered by the Supreme Court. In a retrial, it is

incumbent on the prosecution to prove its case all over again beyond any reasonable doubt by evidence in accordance with law. In this particular case, the obligation included the duty to decide whether it intended to prove that the subject matter of the charge was heroin either by calling the Government chemist or by invoking the proviso to s. 399(i) CPC to admit the chemist report. There was no duty on the part of the appellant to do or assume anything in the conduct of the prosecution. We accordingly held that if the prosecution had for whatever reason intended not to call the Government chemist to give evidence at the retrial notwithstanding the serious error discovered in the chemist report in the earlier appeal, then it must once again comply with the condition precedent imposed by s. 399(i) CPC in order to render the chemist report admissible in evidence. The failure by the prosecution to re-serve the chemist report on the appellant at the retrial was undoubtedly fatal to its case.

For the above reasons we had allowed this appeal by quashing the conviction and setting aside the death sentence. The chemist report being inadmissible, there was no evidence before the Court that the subject matter of the charge was heroin within the meaning of s. 2 of the Dangerous Drugs Act 1952. The appellant was accordingly acquitted and discharged.

Also found at [1991] 2 CLJ 1304